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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act as a "private individual under like circumstances" for the Federal Aviation Administration's failure to discover a safety defect while carrying out its regulatory duty of certifying the airworthiness of aircraft in commercial aviation.

2. Whether a suit against the United States alleging that the FAA negligently certified an aircraft as airworthy as part of its efforts to regulate compliance with minimum safety standards is barred as a claim based upon the performance of a "discretionary function" within the meaning of 28 U.S.C. 2680(a).

3. Whether a suit against the United States alleging that the FAA negligently inspected and certified the installation of a heater into an airplane is barred as a "claim arising out of * * * misrepresentation" within the meaning of 28 U.S.C. 2680(h).

PARTIES TO THE PROCEEDING

Respondents not named in the caption are Kathryn Fleming, Maxine Cearley, Simone Weaver and John W. Dowdle.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 692 F.2d 1209. The opinion of the district court (App. B, *infra*, 7a-15a) and its findings of fact and conclusions of law (*id.* at 16a-27a) are not reported. The earlier opinion of the court of appeals is reported at 614 F.2d 188.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1982 (App. D, *infra*, 30a). On December 28, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

28 U.S.C. 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title [conferring jurisdiction on the district courts] shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *.

STATEMENT

1. In the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. IV) 1301 *et seq.*, Congress has directed the Secretary of Transportation "to promote safety of flight of civil aircraft" by prescribing "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft * * *." 49 U.S.C. 1421(a) and (1). At the same time, Congress has imposed a primary duty on "every person [in the aviation industry] engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply" with the statutory and administrative standards prescribed by the Secretary. 49 U.S.C. 1425(a). See also 49 U.S.C. 1421(b). In order to monitor adequately the aviation industry's compliance with these safety standards, Congress has created a multi-step process

for certifying the safety of aircraft, and the Federal Aviation Administration ("FAA"), acting as the designee for the Secretary of Transportation, has promulgated extensive regulations establishing minimum safety standards that must be satisfied by the designer or manufacturer of an airplane at each step in the certification process. Each step culminates in the issuance of a certificate by the FAA; it is unlawful to operate an airplane that does not have a current "airworthiness certificate," which is the final stage in the certification process. 49 U.S.C. (& Supp. IV) 1430(a).

Before introducing a new type of airplane, a manufacturer must first obtain a "type certificate," which requires FAA approval of the basic design of the aircraft. 49 U.S.C. 1423(a); 14 C.F.R. 21.11-21.53. The manufacturer supplies the FAA with blueprints and/or design drawings, which FAA employees examine for compliance with minimum safety standards. Through this process, which may take years to complete, a basic design is approved and a type certificate is issued. See generally National Academy of Sciences, Committee on FAA Airworthiness Certification Procedures, *Improving Air Safety* 19-20 (1980).

The manufacturer then builds a prototype of the aircraft and applies for a "production certificate." 49 U.S.C. 1423(b); 14 C.F.R. 21.131-21.165. This certificate authorizes the manufacturer to produce copies of the prototype so long as they are identical to the "type" approved. The manufacturer must supply detailed information regarding materials used and production methods employed. 14 C.F.R. 21.143. In addition, FAA employees inspect the prototype and test fly it "to determine compliance with the applicable [safety standards]." 14 C.F.R. 21.157.

After the manufacturer receives a production certificate, and assuming no limitations are imposed on the certificate, it may begin mass production of the ap-

proved aircraft. The manufacturer must, however, obtain an "airworthiness certificate" for each airplane that is assembled. This requires that the airplane be inspected to determine whether it conforms with the prior certifications and the minimum safety standards. 49 U.S.C. 1423(c); 14 C.F.R. 21.171-21.199.

An additional certificate is required for aircraft that are altered by the introduction of a major change in the type design. 14 C.F.R. 21.113. In order to obtain a "supplemental type certificate"—which is the certification step that is at issue in this case—the applicant "must show that the altered product meets applicable airworthiness requirements * * *." 14 C.F.R. 21.115. Supplemental type certificates are the certificates most frequently issued by the FAA; last year more than 1800 were issued.

In light of the extensiveness and complexity of the safety standards (14 C.F.R. 23.1-23.1589) and the large number of aircraft requiring certification, the FAA is unable to monitor or inspect directly every aspect of every design, prototype or assembled aircraft. Accordingly, consistent with the statutory scheme (49 U.S.C. 1425(a)), the regulations impose upon each applicant an obligation, *inter alia*, to "make all inspections and tests necessary to determine * * * [c]ompliance with the applicable airworthiness * * * requirements." 14 C.F.R. 21.33(b)(1). In addition, the vast majority of the FAA's inspections are performed by "designated engineering representatives," who typically are employees of the manufacturer or operator of the aircraft but are licensed by the FAA. 14 C.F.R. 183.29. For each aircraft, literally dozens of inspections are conducted by different individuals with engineering expertise in a particular area—some federal employees but most not.[1]

[1] The nonemployee representatives are not subject to any direct FAA control, but there are spot checks of their work. See generally Dilk, *Negligence of FAA Administration Delegates*

The FAA-signed certificate does not indicate who conducted the inspection of any particular aspect of the aircraft.

2. On October 8, 1968, a DeHavilland Dove aircraft, owned and operated by an air taxi service doing business as Catallina-Vegas Airlines, crashed three minutes after taking off from Las Vegas, Nevada en route to San Diego, California. See 614 F.2d 188, 189 (1979). The pilot, co-pilot and two passengers were killed (*ibid.*). The cause of the crash was an in-flight fire located in the forward baggage compartments of the airplane.

The airplane that crashed was manufactured in 1951 in the United Kingdom. At some point prior to 1965 the airplane was purchased by Air Wisconsin, another air taxi operator. In 1965, pursuant to a contract with Air Wisconsin, Aerodyne Engineering Corporation installed a gasoline fueled heater into both the DeHavilland Dove that crashed and a sister airplane also owned by the airline (614 F.2d at 190). Aerodyne applied for a supplemental type certificate (see page 4, *supra*) to authorize the installation. Thereafter, the heater was installed and the certificate was issued.[2]

In 1966, the airplane was sold to respondent Dowdle, who owned Catallina-Vegas Airlines. Dowdle sent a mechanic to Wisconsin to inspect the airplane; relying in part on the supplemental type certificate as an indi-

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Under the Federal Tort Claims Act, 42 J. Air L. & Com. 575, 583 (1976).

[2] The record fails to establish either who inspected the installation or even if there actually was an inspection. Accordingly, there is no evidence reflecting the quality of the inspection. However, there was evidence indicating that, if an inspection occurred, it would have been conducted by the FAA (Tr. 424-425). ("Tr." refers to the transcript of the original trial held by the district court. "Supp. Tr." refers to the transcript of the proceedings before the district court on remand.)

cation of the airworthiness of the airplane, Dowdle's mechanic recommended that the plane be purchased (Supp. Tr. 25). Between 1966 and the crash in 1968, Dowdle's employees inspected the aircraft on at least eight different occasions, including two major yearly inspections of the gasoline heater (Supp. Tr. 31).

3. In the wake of the crash, five law suits were filed against the United States under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.*, in the United States District Court for the Southern District of California. Three suits for wrongful death were filed by the estates of victims of the accident. One suit for property damage to the DeHavilland Dove was filed by the owner of the air taxi service, and one suit for monies paid for liability coverage on behalf of the owner of the plane was filed by a group of insurance companies.

After trial, the district court entered judgment for the respondents. The court found that the crash occurred because the gasoline line leading to the heater was not adequately clamped to reduce vibration (Tr. 2466). The court concluded that the excessive vibration, coupled with a faulty connection in the line between copper and stainless steel tubing, allowed the gasoline to leak and ignite (Tr. 2474). Relying upon 14 C.F.R. 23.993, which requires fuel lines to have sufficient support to "prevent excessive vibration," the court held that the aircraft was not airworthy as "supplemented" and that the government was negligent in certifying an installation that did not comply with its regulations. The district court also found no contributory negligence on the part of any of the respondents.[3]

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[3] The district court subsequently awarded $200,000 in damages against the United States.

The court of appeals reversed (614 F.2d at 188). The court of appeals held that the district court erred in ruling that a federal statutory duty "automatically give[s] rise to a duty of care to which a state's negligence per se doctrine would be applied" (*id.* at 193). Rather, because the United States is liable only "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, "[t]he crucial inquiry is whether, in undertaking the inspection, a duty arose under state law because of the relationship thereby created—the good samaritan rule" (614 F.2d at 194). The court of appeals expressly declined (*id.* at 190) to consider contentions that respondents' suits were barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h), and instead remanded the case to the district court to determine whether the evidence was sufficient to support a finding of liability under the good samaritan doctrine.

4. On remand, the district court, after taking additional testimony,[4] again entered judgment in favor of respondents. The court, applying California law (App. B, *infra*, 11a), found that California courts have recognized tort liability under the good samaritan rule as set forth in Sections 323 and 324A of the *Restatement (Sec-*

[4] Respondent Dowdle's mechanic testified that he relied upon the supplemental type certificate in deciding whether to approve the airplane for purchase (Supp. Tr. 25). Respondent Cearley testified that her husband, a passenger on the plane, was aware of the government's regulatory efforts to make air travel safe (Supp. Tr. 41).

ond) of Torts (1965).[5] Although the district court was "reluctant to conclude [that] the government's inspection increased the risk of harm in 'some positive way'" (App. B, *infra*, 14a, quoting *Blessing* v. *United States*, 447 F. Supp. 1160, 1199 (E.D. Pa. 1978)), it determined that the United States was liable under the good samaritan rule because respondents "have demonstrated the requisite degree of reliance on the government's inspection and certification. The task of inspection, which is undertaken to protect passengers, is relied upon by such individuals, and if it is negligently performed, it gives rise to the very dangers it was intended to prevent" (App. B, *infra*, 14a).

The court of appeals affirmed (App. A, *infra*, 1a-6a). The court of appeals held (*id.* at 3a) that the government had performed a "service" to decedents and the

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[5] Section 323 of the *Restatement* provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Section 324A of the *Restatement* provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

airline owner within the meaning of the good samaritan doctrine because "the F.A.A.'s regulatory activities are performed for the public as a whole" and "[w]hen voluntarily performing activities solely for the safety of the public, the F.A.A. performs a service for others." The court also concluded that, "[h]aving chosen to make aircraft safety inspections and to certify the result, the government reasonably could expect that members of the public would rely on the government's certification of airworthiness" (*id.* at 3a-4a).

Having found that the district court properly imposed liability on the government under state tort law, the court of appeals considered whether respondents' claims were barred by either the misrepresentation or discretionary function exceptions to the Tort Claims Act. Relying in part on *Neal* v. *Bergland*, 646 F.2d 1178 (6th Cir. 1981), cert. granted, No. 81-1494 (May 24, 1982), the court ruled that the misrepresentation exception did not bar this action because "[t]he basis of the [respondents'] claim * * * is not the misrepresentation or misinformation contained in the certificate, but the negligence of the F.A.A.'s inspection on which the airworthiness certificate was issued" (App. A, *infra*, 4a-5a). The court also rejected the discretionary function exception as a bar to this suit because, in light of the detailed FAA regulations, there was "no room for policy judgment" in the inspection and certification of the aircraft (*id.* at 5a-6a).

Judge Chambers concurred (App. A, *infra*, 6a), stating that "[m]ost of us thought when the Federal Tort Claims Act was passed that the discretionary exception * * * would preclude recovery on the facts of the two cases we decide today, but the developing law seems to have overtaken us." Judge Chambers did not cite the "developing law" upon which he relied.

REASONS FOR GRANTING THE PETITION

The federal government engages in countless health and safety inspections pursuant to regulatory programs designed to protect the public interest. The issue whether the United States is liable to members of the general public under the Federal Tort Claims Act for the failure to discover and order correction of a safety or health hazard during the course of a regulatory inspection is thus a matter of the utmost importance. With regard to aviation litigation alone, more than 300 cases, with potential liability exceeding $3 billion, are currently pending against the United States. If the decision below is allowed to stand, it is reasonable to expect that the government would regularly be named as a defendant whenever an airplane accident may have been caused by a mechanical or design defect.[6]

Moreover, the court of appeals' interpretation of the Federal Tort Claims Act cannot be limited to aircraft litigation. If the failure of the FAA's massive safety inspection program to protect the public in this particular instance gives rise to tort liability, then the United States potentially is liable for the failure to protect against health, safety, or other hazards in virtually every industry engaged in interstate commerce. To cite just a few examples, the Nuclear Regulatory Commis-

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[6] In *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* v. *United States*, 692 F.2d 1205 (9th Cir. 1982), for example, the court of appeals ruled that the United States could be held liable under the good samaritan doctrine for claims in excess of $100 million arising out of the crash of a Brazilian airplane that occurred in Paris in 1973, because the FAA allegedly negligently certified in 1958—15 years earlier—that the design of a lavatory in the airplane satisfied fire protection standards. We are today filing a petition for a writ of certiorari seeking review of this decision as well.

sion inspects nuclear reactors,[7] the Food and Drug Administration inspects and certifies the safety of drugs and food,[8] the Federal Deposit Insurance Corporation inspects the financial records of federally-insured banks,[9] the Occupational Safety and Health Administration inspects the safety and health conditions of most work environments,[10] and the Mine Safety and Health Administration inspects the safety and health conditions of mines.[11] Under all of these regulatory programs it could be said, with as much justification as here, that the United States is "voluntarily performing * * * a service for others" (App. A, *infra*, 3a) and should "expect that members of the public would rely" on the service (*id.* at 4a). The possible government liability under the court of appeals' approach is staggering.

We submit that Congress could not have intended to expose the United States to monetary liability, essentially as an insurer, as a result of certifications and inspections undertaken to enforce compliance with minimum safety standards. The decision below disregards

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[7] 42 U.S.C. 2201(*o*). Indeed, there is now pending a Tort Claims Act suit for $4 billion arising out of the NRC's inspection and oversight activities with regard to the Three Mile Island nuclear reactor. See *General Public Utilities Corp.* v. *United States*, No. 81-4950 (E.D. Pa. Jan. 5, 1983). The government's motion to dismiss that case was denied on grounds similar to those relied on by the court below. The United States Court of Appeals for the Third Circuit has granted our petition for an interlocutory appeal (No. 83-1017).

[8] 21 U.S.C. (& Supp. V) 374. See *Anglo-American & Overseas Corp.* v. *United States*, 144 F. Supp. 635 (S.D.N.Y. 1956), aff'd, 242 F.2d 236 (2d Cir. 1957).

[9] 12 U.S.C. 1820(b). See *First State Bank* v. *United States*, 599 F.2d 558 (3d Cir. 1979), cert. denied, 444 U.S. 1013 (1980).

[10] 29 U.S.C. 657. See *Davis* v. *United States*, 536 F.2d 758 (8th Cir. 1976), aff'g 395 F. Supp. 793 (D. Neb. 1975).

[11] 30 U.S.C. 813. See *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, No. 81-1409 (Apr. 26, 1982).

this Court's admonition that "when dealing with a statute subjecting the Government to liability for potentially great sums of money, [courts] must not promote profligacy by careless construction." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955). In addition, the ruling of the court of appeals cannot be reconciled with decisions of other courts, which have recognized that Congress did not intend to subject government regulatory activities, such as those performed by the FAA, to judicial supervision in the guise of adjudicating tort claims under the FTCA. Finally, the court of appeals engaged in only the most cursory examination of the discretionary function and misrepresentation exceptions to the Tort Claims Act and accordingly reached results inconsistent with decisions of both this Court and other courts of appeals.

1. The waiver of sovereign immunity in the Federal Tort Claims Act is subject to a significant limitation: the United States may be sued only in circumstances where liability could be imposed on a private individual. See 28 U.S.C. 1346(b) and 2674. Thus, Congress intended to make the federal government amenable to suit for "ordinary common-law torts" (*Dalehite* v. *United States*, 346 U.S. 15, 28 (1953) (footnote omitted)), such as automobile accidents involving government employees who drive negligently in the course of their employment.[12] On the other hand, Congress

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[12] See, *e.g.*, 67 Cong. Rec. 11092, 11100 (1926) (remarks of Reps. Celler, Underhill); 69 Cong. Rec. 2192, 3118 (1928) (remarks of Reps. Lozier, Box); *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 16 (1940); *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 27-28 (1940); *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th

plainly intended to protect the United States from suits based on "that class of tort on the part of government which has to do with a governmental function, so to speak." 86 Cong. Rec. 12021 (1940) (remarks of Rep. Gwynne).[13] Regulatory conduct such as that performed by the FAA is engaged in solely by the government; thus, if the immunity for governmental functions is to have any meaning, it must be applicable where, as here, the government performs its unique law enforcement role over private industry. Since the Tort Claims Act does not waive sovereign immunity in situations where there is no liability for private individuals "even remotely analagous to that which [respondents are suggesting] against the United States," *Feres* v. *United States*, 340 U.S. 135, 141 (1950), recovery should be barred for claims arising out of the government's quintessentially sovereign function of inspecting aircraft, and certifying which aircraft may use our airspace, to protect the public safety.

The actions of a government agency in enforcing health and safety legislation pursuant to a program of inspection and certification have no counterpart in the private sector. Unlike private testing laboratories,

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Cong., 2d Sess. 28, 37, 39, 66 (1942); H. R. Rep. No. 2428, 76th Cong., 3d Sess. 3 (1940); H. R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); H. R. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946). The Tort Claims Act was adopted in 1946 after more than 20 years of congressional consideration. This Court has previously recognized that legislative statements made with regard to earlier versions of the FTCA are useful in understanding the meaning of the Act as eventually passed. *Dalehite* v. *United States*, 346 U.S. 15, 26-30 (1953).

[13] See also 67 Cong. Rec. 11086-11100 (1926) (remarks of Reps. Underhill, Ramseyer, Box, LaGuardia, Celler); 69 Cong. Rec. 2191, 2196, 3117, 3127 (1928) (remarks of Reps. Ramseyer, Box, Underhill, Green); H. R. Rep. No. 2800, 71st Cong., 3d Sess. 9 (1931); *Tort Claims: Hearings on H.R. 5373 and H. R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28 (1942).

which certify the quality of a product on request of a particular customer,[14] the government inspects and certifies for the purpose of protecting the general public, by eliminating defective or dangerous instrumentalities from the channels of interstate commerce. The FAA, for example, is required "to promote safety of flight of civil aircraft in air commerce" (49 U.S.C. 1421(a)), and in prescribing standards, rules and regulations, and in issuing certificates, the FAA must "give full consideration to the duty resting upon air carriers to perform their services with the highest degree of safety *in the public interest*" (49 U.S.C. 1421 (b); emphasis added).[15] By the same token, the FAA may grant exemptions from applicable rules and regulations if it "finds that such action would be *in the public interest*" (49 U.S.C. 1421(c); emphasis added). When the FAA breaches these obligations by performing an inadequate inspection or by issuing an unwarranted certificate, it has breached its governmental responsibilities

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[14] See generally Note, *Liability of Certifiers of Quality to Ultimate Consumers*, 36 Notre Dame Law Rev. 176, 193 (1961); Note, *Tort Liability of Independent Testing Agencies*, 22 Rutgers L. Rev 299, 325-326 (1968); Note, *Liability of a Testing Company to Third Parties*, 1964 Wash. U. L. Q. 77, 96-97. Indeed, California has recognized that such laboratories may be liable for negligently certifying the safety of a product. See *Hanberry* v. *Hearst Corp.*, 276 Cal. App. 2d 680, 683, 81 Cal. Rptr. 519, 521 (Ct. App. 1969). The basis for liability was, however, "negligent misrepresentation," which is expressly excluded from the waiver of sovereign immunity in 28 U.S.C. 2680(h). See *United States* v. *Neustadt*, 366 U.S. 696 (1961), and pages 20-22, *infra*.

[15] It is unlawful "[f]or any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate" (49 U.S.C. 1430(a)(1)). FAA inspection and certification, therefore, are integral steps in a program of law enforcement rather than a service performed for a particular airline or air passenger.

to the general public, not its duty of care to a specific individual.

Although the court of appeals acknowledged that no private person assumes responsibilities in any way comparable to those of the FAA (see App. A, *infra*, 3a), it nonetheless concluded that the United States could be held liable under the good samaritan doctrine (see note 5, *supra*). But this tort theory has no application to inspections and certifications carried out pursuant to the FAA's attempts to enforce its safety requirements. The FAA does not undertake to render a service to another, either for that person's benefit or for the benefit of a third person, as required by the *Restatement (Second) of Torts* §§ 323, 324A (1965). As noted above, the FAA's mandate is to promote the safety of the public as a whole by enforcing minimum safety standards, not to provide a service to any particular individual. The activity of the FAA thus stands in stark contrast to the Coast Guard's operation of the lighthouse in *Indian Towing Co.* v. *United States*, *supra*. The FAA does not install equipment in airplanes or operate the aircraft; it merely retains the option of checking to assure that those with operational responsibilities who do perform a service are complying with the minimum safety standards imposed by law. See *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). Airline operators retain primary responsibility for the safety of their equipment, and individual airplane passengers are merely incidental beneficiaries of the FAA's regulatory activities.

Moreover, individual passengers are not entitled to rely upon FAA inspections, as required by the good samaritan doctrine. Negligence in the government's regulatory activities in no way increases the risk of injury to passengers. See App. B, *infra*, 14a. As the statute and regulations make plain (see pages 2, 4, 14, *supra*), the

primary responsibility for the safety of the aircraft remains at all times on the manufacturers, installers and owners of the aviation equipment. See 614 F.2d 188, 193 (1979). In addition, the reliance element of the good samaritan doctrine cannot be satisfied simply because "the government reasonably could expect that members of the public would rely on the government's certification of airworthiness" (App. A, *infra*, 4a). As the Eighth Circuit recognized in an analogous context, "'reliance on the inspection in general is not sufficient * * * to impose a duty of care * * *. Instead, the reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves.'" *Gelley* v. *Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 561 (1979), quoting *Cracraft* v. *City of St. Louis Park*, 279 N.W.2d 801, 806-807 (Minn. 1979). Nothing in the record indicates that any of the passengers had even the slightest knowledge that the FAA issues "supplemental type certificates" or that one was required or issued for the DeHavilland Dove that crashed.[16] Consequently, the good samaritan doctrine does not provide a basis upon which liability may be imposed on the government in a manner analogous to private persons.

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[16] The Ninth Circuit's application of the good samaritan doctrine in *S. A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*) v. *United States*, *supra*, is even more preposterous. In *Varig*, the court held that Brazilian residents flying from Rio de Janeiro to Paris in an airplane operated by a Brazilian airline reasonably relied upon a type certificate issued by the FAA 15 years earlier. According to the Ninth Circuit, "[t]he United States should expect that members of the public," apparently even the Brazilian public, "will rely on the proper performance by the F.A.A. of its duty to inspect and certify." 692 F.2d at 1208.

Because of its misapplication of the good samaritan doctrine, the decision below is at odds with several other appellate decisions, which have rejected attempts to impose liability on the government under the Tort Claims Act for alleged negligence in carrying out health and safety regulatory activities. In *Raymer* v. *United States*, 660 F.2d 1136 (1981), cert. denied, No. 81-1409 (Apr. 26, 1982), for example, the Sixth Circuit held that the federal government was not liable for the failure of a mine safety inspector to order the removal of a hazardous vehicle from a mine. The court held that no injured party relied on the inspector's actions and that any such reliance would have been unjustified because the Mine Safety and Health Act envisions that each mine operator will comply with the statutory safety standards. The FAA statute is no different. It anticipates installer and operator compliance with applicable safety requirements and does not place the government in the position of guaranteeing the safety of aircraft. Cf. *Garbarino* v. *United States*, 666 F.2d 1061, 1066 (6th Cir. 1981) (to extend "the Government's liability to situations involving the alleged negligent issuance of safety inspection certificates * * * would be to make the Government a joint insurer of all activity subject to safety inspection"). The reasoning of the court in *Raymer* would necesssarily require a different result in this case. See also *Patentas* v. *United States*, 687 F.2d 707 (3d Cir. 1982).

Similarly, in *Zabala Clemente* v. *United States*, *supra*, the First Circuit held that the FAA's failure to comply with a local directive to warn passengers of "any safety problems" created no liability because passengers did not know about the specific duties the FAA imposed on its employees and thus could not have relied to their detriment on the FAA. The same reasoning would preclude recovery here. See also *Davis* v. *United States*, 536 F.2d 758 (8th Cir. 1976), aff'g 395 F.

Supp. 793 (D. Neb. 1975) (United States not liable for negligence by employee of OSHA in failing to arrange follow-up inspection of mine); *Gelley* v. *Astra Pharmaceutical Products, Inc.*, *supra* (no liability for FDA's failure to ensure that manufacturer complied with applicable statutes and regulations).

2. The Tort Claims Act precludes recovery for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Reviewing the legislative history of the FTCA, this Court in *Dalehite* v. *United States*, 346 U.S. 15, 26 (1953), characterized the provision as a "governmental regulatory function" exception and concluded that it was intended to insulate the United States from "liability arising from acts of a governmental nature or function."

The court of appeals ruled that the discretionary function exception did not apply to the FAA's actions in this case because "no room for policy judgment or decision exists * * *" (App. A, *infra*, 5a). In so ruling, the court of appeals mischaracterized the FAA's role in enforcing minimum safety standards and in determining whether to issue a certificate to an applicant. It is one thing to hold that the government has a nondiscretionary duty to keep a light in good working order, once it undertakes to operate a lighthouse. See *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). It is altogether a different matter to conclude that no discretion exists when the government attempts to police the safety of an industry and must make complicated and often predictive engineering or scientific judgments about the airworthiness of literally thousands of aircraft. Courts of appeals in analogous situations have consistently held that the discretionary function exception bars suits based on alleged negligence in an agency's issuance of a

license or certificate or in an agency's regulatory approval of a product. See, *e.g.*, *Garbarino* v. *United States*, *supra*; *Bernitsky* v. *United States*, 620 F.2d 948, 952 (3d Cir.), cert. denied, 449 U.S. 870 (1980); *First National Bank* v. *United States*, 552 F.2d 370 (10th Cir.), cert. denied, 434 U.S. 835 (1977); *Lawrence* v. *United States*, 381 F.2d 989, 990-991 (9th Cir. 1967); *United States* v. *Morrell*, 331 F.2d 498, 502 (10th Cir.), cert. denied, 379 U.S. 879 (1964).[17]

The nature of the FAA's regulatory activities is not altered simply because the FAA publishes detailed safety regulations designed to guide manufacturers. Given the magnitude of the FAA's inspection and certification workload, the enforcement of these regulations requires actions "necessarily calling for the exercise of discretion on the part of the governmental agency in charge." *United States* v. *Ure*, 225 F.2d 709, 713 (9th Cir. 1955). For example, the decision whether a gasoline line in a heater has "excessive vibration" on the one hand (14 C.F.R. 23.993) or sufficient flexibility to withstand stress on the other requires a difficult, and essentially subjective, engineering assessment; it is unreasonable to assume that Congress intended to subject these regulatory determinations to second guessing by a court through the medium of tort litigation. Such judicial oversight, applying varying state law, would direct-

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[17] When Congress included the discretionary function exception in the Tort Claims Act, it removed the exception for claims for damages "caused by the administration of any law or laws by the Federal Trade Commission or by the Securities Exchange Commission." Congress expanded this exception to cover all governmental agencies, with the intent to bar "claims against Federal agencies growing out of their regulatory activities." House Comm. on the Judiciary, 77th Cong., 2d Sess., *Federal Tort Claims Act, Memorandum, With Appendixes, Explanatory of Comm. Print of H.R. 5373*, at 8 (Comm. Print 1942). The efforts of the FAA to detect violations of its minimum safety standards are as much a regulatory activity as attempts by the FTC or SEC to ferret out infractions of their statutes and rules.

ly impair a vital governmental function—enforcing aircraft safety laws—in a way that Congress rejected when it adopted the discretionary function exception. See *Dalehite* v. *United States*, *supra*, 346 U.S. at 26.

3. If, contrary to our submission in parts 1 and 2, the United States has committed a tort not barred under either Section 2674 or 2680(a), it is the tort of misrepresentation, for which recovery is expressly precluded by 28 U.S.C. 2680(h). Respondents' claim is that the United States negligently inspected the installation of a heater and therefore improperly issued a certificate of airworthiness. The court of appeals held that the claim was one for "negligent inspection" and thus not within Section 2680(h) (App. A, *infra*, 5a). But its reasoning is flatly inconsistent with this Court's decision in *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961), in which the Court held that a claim that the Federal Housing Administration negligently inspected a house purchased by plaintiffs was merely "to state the traditional and commonly understood legal definition of the tort of 'negligent' misrepresentation," for which recovery against the United States is barred.[18]

In both *Neustadt* and the instant case, a government employee conducted an inspection and issued a written report stating, incorrectly, that the object inspected was in good condition. In both cases plaintiffs claimed that they were injured as a result of their reliance on the false information conveyed to them by the written report. Indeed, in this case, respondent Dowdle empha-

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[18] Other courts of appeals have held, contrary to the court below, that certification or licensing following an inspection is within the misrepresentation exception. See, *e.g.*, *Reynolds* v. *United States*, 643 F.2d 707, 711 (10th Cir.), cert. denied, 454 U.S. 817 (1981); *Somali Development Bank* v. *United States*, 508 F.2d 817, 821 (Ct. Cl. 1974); *Rey* v. *United States*, 484 F.2d 45, 49-50 (5th Cir. 1973); *Anglo-American & Overseas Corp.* v. *United States*, 144 F. Supp. 635 S.D.N.Y. 1956), aff'd, 242 F.2d 236 (2d Cir. 1957).

sized in his testimony at trial that his mechanic expressly relied on the airworthiness certificate in deciding whether to recommend that Dowdle purchase the airplane (see pages 5-6, *supra*).[19] Thus, the court of appeals' ruling that the misrepresentation exception is inapplicable because "[t]he basis of [respondents'] claim * * * is not the misrepresentation or misinformation contained in the certificate, but the negligence of the F.A.A.'s inspection on which the airworthiness certificate was issued" (App. A, *infra*, 4a) is both contrary to the facts and inconsistent with the reasoning of this Court in *Neustadt*.[20]

In rejecting the government's claim that the misrepresentation exception bars this suit, the court of appeals relied heavily on *Neal* v. *Bergland*, 646 F.2d 1178, 1183-1184 (6th Cir. 1981), cert. granted, No.

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[19] Although respondent Dowdle alone alleged that he directly relied on the misrepresentation, the claims of the other respondents also necessarily are based on reliance, which is an element of the good samaritan doctrine, and hence "arise out of" the misrepresentation, within the meaning of Section 2680(h).

[20] See *Restatement (First) of Torts* § 311 (1934), which is labeled "Negligent Misrepresentation Involving Risk of Bodily Harm" and includes the following as one of its illustrations (*id.* at 845-846):

> The A Boiler Insurance Company undertakes as part of its services to inspect the boiler of B. It issues a certificate that the boiler is in good condition for use. In reliance upon this certificate, B uses the boiler. The boiler bursts due to a defect which a reasonably careful inspection would have disclosed. Explosion of the boiler wrecks the adjacent building of C and causes bodily harm to him. The A Company is liable to C for his bodily harm and the wrecking of his building caused by the explosion of the boiler.

In enacting Section 2680(h), Congress intended to adopt the commonly understood definition of "misrepresentation," *United States* v. *Neustadt*, *supra*, 366 U.S. at 707, which is best ascertained from the Restatement of Torts in existence at the time. See the government's brief in *Block* v. *Neal*, No. 81-1494, a copy of which we are sending to counsel for respondents.

81-1494 (May 24, 1982). In *Neal*, the Sixth Circuit declined to apply the misrepresentation exception to a claim based on an allegedly negligent inspection of a house by the Farmers Home Administration. It seems likely that this Court's decision in *Neal* will have a substantial bearing on the applicability of the misrepresentation exception to this suit. Accordingly, the Court may wish to hold this petition pending the decision in *Neal*, although we believe that the court of appeals' failure to dismiss respondents' claims on either of the first two grounds asserted in this petition justifies plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Block* v. *Neal* and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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FEBRUARY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5062

DC Nos. 71-036-E, 71-037-E,
71-038-E, 71-039-E, 70-138-E

UNITED SCOTTISH INSURANCE,
KATHRYN FLEMING, MAXINE CEARLEY,
SIMONE WEAVER & JOHN W. DOWDLE,
PLAINTIFF-APPELLEES,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the Southern District of California

William B. Enright, District Judge, Presiding
Argued and Submitted June 10, 1982

FILED OCT. 8, 1982

OPINION

BEFORE: CHAMBERS, GOODWIN and PREGERSON, *Circuit Judges*

GOODWIN, *Circuit Judge*

Fourteen years ago an air taxi crashed in Nevada because a defective fuel line for a gasoline-burning cabin heater caught fire in flight. The aircraft had been inspected and certified for airworthiness by the Federal Aviation Administration (F.A.A.). This is the second appeal to this court. The pertinent facts and most of the

applicable law are set forth in our earlier opinion. *United Scottish Ins. Co.* v. *United States*, 614 F.2d 188 (9th Cir. 1979).

This case was remanded to the district court to determine whether California courts would impose a duty of due care by applying the good samaritan doctrine, formulated in Restatement Second, Torts, §§ 323 and 324A and, if so, whether. under the facts of this case, California courts would find this duty breached if a private person had conducted the inspection and issued the certificate of airworthiness in question.

The trial judge, citing California cases,[1] answered both questions in the affirmative and confirmed the judgment earlier entered on behalf of plaintiffs under the Federal Tort Claims Act. 28 U.S.C. § 2671, *et seq.*

In this second appeal, the government challenges the trial court's rulings on the application of the good samaritan rule and also challenges the trial court's rulings on other questions left open in the first appeal.

In order for good samaritan liability to lie under §§ 323 or 324A the defendant must have undertaken to render a service to the injured party or to another for the protection of the injured party. This service must have either increased the risk of injury to the person injured or caused that person to rely on proper performance of the service. *See S.A. Empresa de Viacao (Varig Airlines)* v. *United States*, No. 81-5366, (decided this day, (9th Cir.).

Because the trial court held that the F.A.A.'s inspection did not increase the risk of harm to the plaintiff, the United States appeals on the remaining grounds that it was not performing a service and that, in any case, no plaintiff relied on the F.A.A.'s inspection of

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[1] *Coffee* v. *McDonnell-Douglas Corp.*, 503 P.2d 1366 (1972); *Schwartz* v. *Helms Bakery Limited*, 430 P.2d 68 (1967); *Brockett* v. *Kitchen Boyd Motor Company*, 264 Cal.App.2d 69, 70 Cal.Rptr. 136 (1968).

the cabin heater. The government also renews the contention that its inspection falls within the misrepresentation and discretionary function exceptions to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) and (h). These contentions were left open in the first appeal.

1. *Service*

The government argues that it was performing regulatory duties rather than rendering a service to another person, either for that person's benefit, as required by Restatement Second, Torts, § 323, or for the benefit of a third person, as required by § 324A. The government cites *Roberson* v. *United States*, 382 F.2d 714 (9th Cir. 1967), in which we held that the government's voluntary safety inspection activities at Glen Canyon Dam were not an undertaking to render services to the contractor or to workers injured by a negligently maintained piece of construction equipment.

In *Roberson*, however, the government had reserved the right of inspection under its contract with the builder. We concluded that the inspection was not a service to others but a function by which the government "sought only to protect its own interest, namely to assure itself that the contractor was performing in the manner required of it under the contract." *Id.* at 721.

In inspecting and certifying the deHaviland Dove aircraft in this case, the United States had no comparable interest of its own to protect. As the government itself acknowledges, the F.A.A.'s regulatory activities are performed for the public as a whole. When voluntarily performing activities solely for the safety of the public, the F.A.A. performs a service for others. *See Arney* v. *United States*, 479 F.2d 653 (9th Cir. 1973).

2. *Reliance*

The district court, in holding that the victims relied on the F.A.A. inspection, correctly pointed out that the

relationship F.A.A. inspectors have with pilots, owners, and passengers is imbued with reliance. The United States, until it voluntarily undertook to do so, had no duty to occupy the field of aircraft inspection and certification. Having chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public would rely on the government's certification of airworthiness. *S.A. Empresa de Viacao (Varig Airlines)* v. *United States, supra.* The careful performance of aircraft inspections is the essence of the government's duty, once the inspections are undertaken. *In re Air Crash Disaster Near Silver Plume, Colo.*, 445 F. Supp. 384 (D. Kan 1977).

The district court's analysis of service and reliance under the good samaritan rule were therefore free from error.

3. *Misrepresentation exception*

The Federal Tort Claim Act does not impose governmental liability for "[a]ny claim arising out of . . . misrepresentation. . . ." 28 U.S.C. § 2680(h). The government contends that the plaintiffs' claim is, in fact, an action for misrepresentation rather than for negligence.

The basis of the plaintiffs' claim, however, is not the misrepresentation or misinformation contained in the certificate, but the negligence of the F.A.A.'s inspection on which the airworthiness certificate was issued. As the court in the *Silver Plume* case said: "[i]t is the inspection undertaken to protect air travelers from certain dangers which is relied upon by such travelers and which, if negligently performed, gives rise to the very dangers the inspection intended to prevent. The certification is a reporting of results of such inspection...." *In Re Air Crash Disaster Near Silver Plume, Colorado,* 445 F. Supp. at 409. *See also Neal* v. *Bergland,* 646

F.2d 1178, 1183-84 (7th Cir. 1981), *cert. granted*, 102 S.Ct. 2267 (1982).

Because plaintiffs relied on the F.A.A.'s aircraft inspection undertaken to protect passengers, the government's misrepresentation argument, based on a certificate issued improperly, is unpersuasive. *S.A. Empresa de Viacao (Varig Airlines)* v. *United States*, *supra*. The district court's finding that the misrepresentation exception is inapplicable is correct as a matter of law.

4. Discretionary Function Exception

The Federal Tort Claims Act does not impose governmental tort liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The government argues that its regulation of the airline industry is a discretionary function and that liability for its negligent performance of that function is therefore excluded. The Supreme Court in *Dalehite* v. *United States*, 346 U.S. 15 (1953), states that a discretionary function necessarily "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." *Id.* at 35-36.

All aircraft must comply with F.A.A. requirements in order to be certified as airworthy and thereafter placed in operation. F.A.A. officials enforce the requirements by inspecting the aircraft, but cannot in any way change or waive safety requirements. Because no room for policy judgment or decision exists, a discretionary function is not being performed, and the trial

court correctly refused to protect the government under the discretionary function clause.

Affirmed.

CHAMBERS, concurring:

It is apparent that if we affirm United Scottish Insurance, we must reverse Varig Airlines. I believe that the development of the law on the Federal Tort Claims Act has overtaken me and that I must affirm the former and reverse the latter. Most of us thought when the Federal Torts Claims Act was passed that the discretionary exception to the Federal Torts Claims Act would preclude recovery on the facts of the two cases we decide today, but the developing law seems to have overtaken us. Thus I concur.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 71-36-E

UNITED SCOTTISH INSURANCE COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 71-37-E

KATHRYN FLEMING, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 70-138-E

MAXINE CEARLEY, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 71-38-E

SIMONE WEAVER, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 71-39-E

JOHN W. DOWDLE, JR., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Filed Nov. 24, 1980

MEMORANDUM DECISION

In 1976 this court granted judgment against the government for negligent inspection of the aircraft involved in a 1968 plane crash in Las Vegas, Nevada. The crash resulted from an in-flight fire aboard the aircraft. The government appealed this judgment to the Ninth Circuit. On November 29, 1979, the Ninth Circuit entered an order reversing the decision of this court and remanding the case to the district court for further proceedings consistent with its opinion. *United Scottish Insurance Co.* v. *United States*, 614 F.2d 188 (9th Cir. 1979), *rehearing denied* (1980).

Upon consideration of this case the Ninth Circuit held the federal statutory duty in question did not give rise to a duty of care which should be analyzed by automatic application of the negligence *per se* doctrine. *Id.* at 193. Rather, under the Federal Tort Claims Act, the government is liable only "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

The Ninth Circuit described the government inspection of the aircraft as a "good Samaritan" function. Thus, the government would be liable only to the extent a private individual would be for undertaking to perform a duty to another. *United Scottish Insurance Co.* v. *United States*, *supra*, 614 F.2d at 194. In *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), the

Supreme Court suggested the proper basis for liability in tort for such governmental activities. As the Court stated, "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Id.* at 64-65.

In applying the *Indian Towing* standard of liability to the instant case, the Ninth Circuit held the government may not be held liable for negligent inspection of private property unless the applicable state law requirements for a cause of action under the good Samaritan doctrine are satisfied. *United Scottish Insurance Co.* v. *United States, supra*, 614 F.2d at 195. The court suggested three issues for consideration on remand: (1) which state's substantive law applies, (2) whether that state has adopted a good Samaritan rule, and, if so, (3) whether the plaintiffs' case herein satisfies the rule as formulated by the state. *Id.* at 198.

Upon due consideration of the opinion of the Ninth Circuit, the parties' pleadings and memoranda, other documents filed herein, the evidence presented throughout the course of these proceedings, and the arguments presented at the hearing on remand, the court hereby confirms the judgment in plaintiffs' favor. In reaching this conclusion the court holds California law is applicable to the action.

1. *Choice of Law*

Under the Federal Tort Claims Act, liability is determined by the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). In addition, the statute requires application of the whole law of the state where the act or omission occurred. *Richards* v. *United States*, 369 U.S. 1, 11 (1962). The inspection of the aircraft and issuance of certification, the alleged instances of negligence, occurred in Texas. Thus, the court must apply Texas conflict of law principles and its substan-

tive law to determine whether it would apply Texas law, or that of some other state.

Texas uses the "most significant contacts" test to determine which state's laws govern the action in question. *Melton* v. *Borg-Warner Corp.*, 467 F. Supp. 983 (W.D. Tex. 1979). Under this test the court must consider the following factors to determine which state has the most significant contacts with the parties and alleged act of negligence:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties centered.

Restatement (Second) of Conflict of Laws § 145 (1971)

In the instant case, the injury occurred in Nevada and the conduct causing the injury in Texas. Plaintiffs' domicile was in California and the parties had no relationship which was centered in any particular state. None of the contacts as enumerated in the Restatement list is relatively more important with respect to the issues at hand than the others. Thus, the law of Nevada, Texas or California is potentially applicable to the instant action.

However, other contacts of the parties predominate in California. California is the forum state, and the contract for air passage was formed in this state. All decedents and their heirs reside in California, which is the state in which the administration of their estates has transpired. Plaintiffs would expect actions concerning injuries received on a flight originating in California to be governed by California law. Because none of the factors under the "most significant contacts" test is determinative and contacts predominate in California, California law is applicable in the instant action.

If this court followed a strict application of the law of the place of the omission, Texas law would apply in this action. However, application of Texas law would not alter the substantive analysis since both states follow the good Samaritan doctrine as established in the Second Restatement of Torts. *Coffee* v. *McDonnell-Douglas Corp.*, 8 Cal. 3d 551 (1972); *Colonial Savings Association* v. *Taylor*, 544 S.W. 2d 116 (Tex. Sup. Ct. 1976). Thus, though California law is applicable, there is little difference between California and Texas law on this form of liability.

2. *Good Samaritan Rule*

California follows the Restatement views of the good Samaritan rule set forth in Sections 323 and 324 A of the Restatement. *Coffee* v. *McDonnell-Douglas Corp.*, 8 Cal. 3d 551 (1972); *Schwartz* v. *Helms Bakery Limited*, 67 Cal. 2d 232, 238 (1967); *Brockett* v. *Kitchen Boyd Motor Company*, 264 Cal. App. 21 69, 71-72 (1968).

Section 323 of the Restatement provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his risk to exercise care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965)

Thus, to establish liability under this section, plaintiffs must demonstrate either that the failure of the government to exercise reasonable care in the heater inspection increased the risk of harm to plaintiffs or that

plaintiffs suffered harm because of their reliance on the inspection.

Section 324 A of the Second Restatement of Torts states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324 A (1965)

Under this section, plaintiffs must demonstrate either that the government's inspection and certification increased the risk of harm to them or that they relied on the undertaking by the government and suffered harm thereby. These criteria are identical to those set forth in Section 323. In addition, imposition of liability under Section 324 A may be justified if the government performed a duty for the passengers which was owed to them by the owners of the aircraft.

Section 323 of the Restatement is applicable when it can be shown that the purpose of the actor in question was to render a direct service to the person who was harmed or to persons of that class. *Roberson* v. *United States*, 382 F.2d 714, 721 (9th Cir. 1967). Inspection and certification of aircraft by the government constitute direct services to the air traveling public. This is evidenced by the numerous references to safety which are contained in relevant provisions of the United States Code. *See*, 49 U.S.C. §§ 1348, 1374, 1402, 1421, 1423. Thus, in evaluating the possibility of imposition of

liability under the good Samaritan doctrines, the court has elected to rely on the provisions of Section 323.

However, if the tasks of inspection and certification cannot be characterized as "direct services" to prospective passengers and if the services were rendered to aircraft owners as a protective device for the air travelers, the provisions of Section 324 A are applicable.

Under both Sections 323 and 324 A one who undertakes to render services is subject to liability for failure to exercise reasonable care if such failure increases the risk of harm, or if the harm is suffered because of the beneficiary's reliance thereon. Thus, if the elements for imposition of liability under Section 323 are satisfied herein, liability would similarly result from an application of Section 324 A. Therefore, though the court will rely on the provisions of Section 323 in its analysis, if the relationship between the government and plaintiffs is viewed as an indirect one, and therefore susceptible of analysis under Section 324 A, the result will not be altered.

3. *Liability Under the Good Samaritan Doctrine*

Plaintiffs assert both tests contained in § 323 are satisfied in the present action.

First, plaintiffs maintain the government is liable for the physical harm they suffered because the negligent inspection of the aircraft's heater increased the risk of harm to the passengers aboard the plane. Restatement (Second) of Torts § 323(a) (1965). Inspection and certification of the heater were prerequisites to its installation. Presumably, if the government exercised reasonable care in the inspection of the heater and noticed its defects, modification would have preceded installation. Thus, plaintiffs contend, the government's negligent performance of this task, which effectively authorized the installation, increased the risk of harm to the passengers.

This theory of liability is not immaterial. However, this court is reluctant to conclude the government's inspection increased the risk of harm in "some positive way." *Blessing* v. *United States*, 447 F. Supp. 1160, 1199 (E.D. Pa. 1978). In addition, since plaintiffs' cause of action meets the test set forth in § 323(b) of the Restatement, this court will not base its decision on the proposition that defendant's actions increased the risk of harm to the aircraft's passengers.

Secondly, plaintiffs contend this action satisfies the test of § 323(b) because the harm they suffered was the result of their reliance on the government's undertaking. They assert passengers aboard commercial flights rely upon F.A.A. inspections, as they are completely unable to determine the airworthiness of the aircraft they utilize. In addition, plaintiffs offered evidence that owners of aircraft, as well as the mechanics who inspect them, rely on the tasks performed by the F.A.A. and the certifications which provide documentation of their findings. Thus, plaintiffs conclude they have established liability herein, because they relied on the government's undertaking and suffered harm thereby.

The court holds that plaintiffs in the instant action have demonstrated the requisite degree of reliance on the government's inspection and certification. The task of inspection, which is undertaken to protect passengers, is relied upon by such individuals, and if it is negligently performed, it gives rise to the very dangers it was intended to prevent. *In Re Air Crash Disaster Near Silver Plume, Colorado*, 445 F. Supp. 384, 409 (D. Kan. 1977). In addition plaintiffs have shown that the owner of the aircraft in question relied upon the F.A.A.'s certificate, and that mechanics who conduct periodic inspections similarly rely on the documentation.

Thus, the defendant is liable to the plaintiffs for the physical harm they sustained as a result of the govern-

ment's failure to exercise reasonable care in performance of inspection and certification of the aircraft. Restatement (Second) of Torts § 323(b). This liability is based on the finding that plaintiffs relied upon the government's undertaking and suffered harm thereby.

In accordance with this opinion and the annexed findings of fact and conclusions of law, the judgment for the plaintiffs is hereby confirmed.

An appropriate form of judgment shall be prepared by plaintiffs and submitted to the court within five days and also served on defendant for approval as to form.

DATED: November 18, 1980.

/s/ WILLIAM B. ENRIGHT, *Judge*
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 71-36-E

UNITED SCOTTISH INSURANCE COMPANY, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 71-37-E

KATHRYN FLEMING, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 70-138-E

MAXINE CEARLEY, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 71-38-E

SIMONE WEAVER, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 71-39-E

JOHN W. DOWDLE, JR., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

FILED NOV. 24, 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was remanded for further findings from the Court of Appeals for the Ninth Circuit, and hearings were held in the above entitled court, the Honorable William B. Enright, judge presiding, without a jury, on June 10, 1980, and September 19, 1980.

Richard F. Gerry and Marcia W. Hughes of Casey, Gerry, Casey, Westbrook & Reed apeared as counsel for plaintiffs United Scottish Insurance Company, et al., Kathryn Fleming, et al., Simone Weaver, et al., and John W. Dowdle, Jr. James H. Miller and Greer, Popko, Miller and Foerster appeared as counsel for plaintiff Maxine Cearley, et al., and Michael Quinton, Assistant United States Attorney, appeared as counsel for the defendant United States of America.

Said cause having been heard, evidence both oral and documentary having been introduced, and such cause having been submitted for a decision, the court, having reaffirmed its decision on September 19, 1980 in favor of plaintiffs and against defendant United States of America, now makes the following additional findings of fact and conclusions of law.

FINDINGS OF FACT

1. The United States through its employees and agents of the Federal Aviation Administration in certif-

icating aircraft as airworthy and issuing supplemental type certificates undertook to warn the public of danger.

2. The United States through its employees and agents of the Federal Aviation Administration in certificating aircraft as airworthy and issuing a supplemental type certificate thereby induced reliance.

3. The United States through its employees and agents of the Federal Aviation Administration in certificating aircraft as airworthy and issuing a supplemental type certificate thereby induced reliance by the general air traveling public.

4. The United States acting through its inspectors undertook to perform a "good Samaritan" task in inspecting the aircraft herein for airworthiness.

5. The United States acting through its inspectors failed to perform its "good Samaritan" task in a careful manner.

6. The United States under the Federal Aviation Act of 1958 has preempted the field in the inspection of aircraft for airworthiness.

7. The United States under the Federal Aviation Act of 1958 and its predecessors has preempted the field as to the inspection of modifications to existing aircraft.

8. The United States acting under the Federal Aviation Act and the Civil Aeronautics Act of 1926 took over the function of inspection of private and commercial aircraft from private persons.

9. Prior to the enactment of the Civil Aeronautics Act of 1926, private persons inspected private and commercial aircraft for airworthiness.

10. Prior to the passage of the Civil Aeronautics Act of 1926, private persons performed the function of inspecting private aircraft after modification or alteration.

11. In 1927 the United States government began taking over the functions of private persons in the inspection of the aircraft for airworthiness.

12. The purpose of the Air Commerce Act of 1926 was to promote safety in air commerce.

13. The purpose of the Federal Aviation Act of 1958 was to promote safety in air commerce.

14. Public confidence in air travel has been fostered in large measure by the knowledge that the United States is constantly inspecting aircraft in order to promote safety.

15. The negligent inspection and certification of the aircraft herein by the Federal Aviation Administration occurred in the State of Texas.

16. The Federal Tort Claims Act requires application not only of the substantive law of Texas but also the whole law of that state including its choice of laws rules.

17. Texas follows the most significant relationship rule set forth in the American Law Institute Restatement Second of Conflicts.

18. Under Texas choice of law rules, Texas would apply the substantive law of California.

19. California has adopted the "good Samaritan" principle expressed in Section 323 of the Restatement Second of Torts, that one who voluntarily undertakes to perform an action must do so with due care.

20. California has adopted the "good Samaritan" principle expressed in Section 324A of the Restatement Second of Torts, that one who voluntarily undertakes to perform an action must do so with due care.

21. Texas also has adopted the "good Samaritan" principle expressed in Section 323 of the Restatement Second of Torts, that one who voluntarily undertakes to perform an action must do so with due care.

22. It is immaterial whether the substantive law of California or Texas is applied to the liability of the

United States herein as both states follow the "good Samaritan" principles set forth in the Restatement Second of Torts, Section 323.

23. The government assumed the duty to conduct the inspection and certification of the aircraft herein with due care.

24. The relationship between the parties, formed when the defendant undertook, even if voluntarily, to inspect and certificate the aircraft herein, was such that plaintiffs are entitled to legal protection against the wrongful conduct of the defendant.

25. The Federal Aviation Administration and the Federal Aviation Regulations required the aircraft herein to be inspected by Federal Aviation Administration personnel after the installation of the heater in 1965 to determine its airworthiness as modified.

26. The Federal Aviation Administration required the aircraft herein to be certificated after the installation of the heater in 1965.

27. The Federal Aviation Administration voluntarily undertook the inspection of the aircraft herein to determine its airworthiness after the installation of the heater in 1965.

28. The Federal Aviation Administration undertook and assumed the duty to inspect and certificate the aircraft herein.

29. The Federal Aviation Administration negligently inspected the aircraft herein after the installation of the heater in 1965.

30. The Federal Aviation Administration negligently certificated the aircraft herein as airworthy after the installation of the heater in 1965.

31. Plaintiff John W. Dowdle, Jr. specifically relied upon the inspection of the aircraft herein by the Federal Aviation Administration after the installation of the heater in 1965.

32. The damages suffered by the plaintiffs were because of the reliance of plaintiffs and plaintiffs' decedents upon the undertaking by the Federal Aviation Administration.

33. Plaintiff's insurance companies stand in the shoes of their insured John W. Dowdle, Jr.

34. Plaintiff's insurance companies are subrogees of Dowdle and have the same rights as Dowdle.

35. The general air traveling public relies upon the inspection of aircraft by the Federal Aviation Administration.

36. The general air traveling public relies upon the certification of aircraft by the Federal Aviation Administration.

37. The purpose of the inspection of aircraft by the Federal Aviation Administration is to insure the safety of the general air traveling public.

38. The general air traveling public is justified in relying upon the inspection of aircraft by the Federal Aviation Administration.

39. In inspecting the aircraft herein after the installation of the heater in 1965 the Federal Aviation Administration undertook to perform a duty owed to the passengers and their heirs by the carrier.

40. In inspecting the aircraft herein after the installation of the heater in 1965 the Federal Aviation Administration undertook to perform a duty owed to the passengers and their heirs by the owner of the plane.

41. In inspecting the aircraft herein after the installation of the heater in 1965, the mechanic Schossow owed a duty to the passengers and their heirs.

42. In conducting subsequent inspections, the mechanic Schossow relied upon the paperwork including the Supplemental Type Certificate.

43. In inspecting the installation of the heater after the installation of the heater in 1965, the Federal Avia-

tion Administration undertook to perform a duty owed to the passengers and their heirs by the carrier.

44. In inspecting the aircraft herein after the installation of the heater in 1965, the Federal Aviation Administration undertook to perform a duty owed to the passengers and their heirs and the owner of the aircraft.

45. It is the standard practice within the industry for the owners of aircraft to rely on the airworthiness certificate placed in each aircraft by the Federal Aviation Administration.

46. It is the standard practice within the industry for the mechanics to rely on the airworthiness certificate placed in each aircraft by the Federal Aviation Administration.

47. It is the standard practice within the industry for the subsequent mechanics who inspect the aircraft to rely on the airworthiness certificate placed in each aircraft by the Federal Aviation Administration.

48. It is the standard practice within the industry for the owners of aircraft to rely on the supplemental type certificate placed in each aircraft by the Federal Aviation Administration.

49. It is impossible, uneconomical, unreasonable, and unfeasible for an owner of an aircraft inspected and certificated by the Federal Aviation Administration to take down the entire airplane and inspect it completely.

50. The owners of aircraft rely on the paperwork accompanying each aircraft as to its airworthiness.

51. The owners of aircraft justifiably rely on the paperwork accompanying each aircraft as to its airworthiness.

52. The repairmen who service aircraft rely on the paperwork accompanying each aircraft as to its airworthiness.

53. The repairmen who service aircraft justifiably rely on the paperwork accompanying each aircraft as to its airworthiness.

54. The mechanics who service aircraft rely on the paperwork accompanying each aircraft as to its airworthiness.

55. The mechanics who service aircraft justifiably rely on the paperwork accompanying each aircraft as to its airworthiness.

56. Mr. Dowdle's mechanic Frank Schossow, Jr. was sent to Wisconsin for the specific purpose of inspecting the paperwork on the aircraft herein prior to its purchase by Mr. Dowdle.

57. The paperwork necessarily accompanying every aircraft includes the registration and airworthiness certificate, the airplane book, the engine or engine's logbooks, and all the operating history including the repair and alteration forms since the airplane was in use.

58. Mr. Dowdle's mechanic Frank Schossow, Jr. specifically relied on the paperwork accompanying the aircraft herein including the Form 337 dealing with the heater installation.

59. Mr. Dowdle's mechanic Frank Schossow, Jr. justifiably relied on the paperwork accompanying the aircraft herein including the Form 337 dealing with the heater installation.

60. Mr. Dowdle's mechanic Frank Schossow, Jr., in servicing and maintaining the aircraft herein, specifically relied on the paperwork accompanying the aircraft herein including the Form 337 dealing with the heater installation.

61. The Form 337 accompanying the aircraft herein showed the installation had been inspected by a Federal Aviation Administration inspector.

62. Mr. Cearley, prior to his death in the crash of the aircraft herein had been an engineer in the aviation in-

dustry for many years and was aware of the role of the United States in the inspection of aircraft.

63. Mr. Cearley relied on the role of the Federal Aviation Administration in insuring the safety of aircraft.

64. Mrs. Fleming relied on the role of the Federal Aviation Administration in insuring the safety of aircraft.

65. The pilot of the aircraft herein was required by Federal Aviation Administration regulations to review the paperwork of the aircraft before each flight.

66. The pilot of the aircraft herein was entitled to rely on the paperwork accompanying the aircraft in determining the airworthiness of that airplane.

67. The pilot of the aircraft herein did necessarily rely on the paperwork accompanying the aircraft as to the airworthiness of the airplane on the day of the fatal crash.

68. Prior to 1926, the manufacture, alteration, repair, and inspection of aircraft were done by private persons.

69. In 1927, the United States began to certificate aircraft as airworthy.

70. Subsequent to 1926, the United States began to regulate the manufacture, alteration, repair, and inspection of aircraft.

71. By the passage of the Federal Aviation Act of 1958, the United States had totally taken over the regulations of the manufacture, alteration, repair and inspection of aircraft.

72. Mr. Weaver, who was killed in the crash of the aircraft herein, was one of the pilots aboard.

73. The role of the United States in taking over the functions of inspection and certification of aircraft from private persons is analogous to the assumption of the duties of private air traffic controllers.

74. The relationship between pilots, owners, and passengers and the Federal Aviation Administration inspectors is imbued with reliance.

75. The role of inspectors of private aircraft existed prior to the attempt by the United States to regulate this function.

76. The certification and inspection of aircraft is not a uniquely governmental function.

77. California would recognize this action if the United States were a private person.

78. The law of California would declare liability—including a duty—upon a private person in like circumstances.

79. Liability may arise out of a breach of Federal Aviation Regulations.

80. The purpose of the Federal Aviation Regulations is to promote air safety.

81. An aircraft cannot be returned to service after a maodification unless the Federal Aviation Administration has issued a Supplemental Type Certificate for that modification, and no modification can be allowed to remain in an aircraft if inspection reveals the modification is not in conformance with a valid Supplemental Type Certificate.

82. The procedure for the issuance of Supplemental Type Certificate and conformance inspection of modifications is specifically designed and intended to prevent a modification from being placed in an aircraft which would make the aircraft unairworthy or dangerous.

83. The court takes judicial notice of the Federal Aviation Administration Historical Fact Book, Department of Transportation, Federal Aviation Administration.

84. The court takes judicial notice of 14 C.F.R. Sections 1.1, 21.1, 21.111, 21.113, 21.115, 21.117, 21.119, 43.1, 43.3, 43.5, 43.7, 43.13, 91.1, 91.27, 91.29, 91.161, 91.173, 145.1, 145.3, 145.11, 145.23, 145.39, 145.43,

145.45, 145.51, 145.57, 145.59, 145.61, 183.1, 183.11, 183.21, 183.23, 183.25, 183.29, 183.31.

85. The court takes judicial notice of Handbook 8110.4, Type Certification, Department of Transportation, Federal Aviation Administration.

86. The court takes judicial notice of California Civil Code Sections 2100 and 2101.

87. The court takes judicial notice of 49 U.S.C. Section 1301 *et seq.*

CONCLUSIONS OF LAW

1. The United States undertook to inspect and certificate the aircraft herein and is liable for injuries caused by the negligent performance of those tasks.

2. The United States government may be held liable under the Tort Claims Act where it decides to provide such services and does so negligently.

3. The applicable law is that of the State of California, utilizing the choice of law rules of the State of Texas where the negligent inspection occurred.

4. The State of California recognizes the "good Samaritan" principles set forth in the Restatement Second of Torts, Sections 323 and 324A.

5. Having assumed the inspection and certification of aircraft, the United States assumed the duty to conduct and complete the inspection and certification with due care.

6. The relationship between the parties was such that the plaintiffs were entitled to legal protection against the wrongful conduct of the United States.

7. It is immaterial whether the substantive law of California or that of Texas is utilized pursuant to the application of Restatement of Second of Torts, Section 323.

8. Since the mandate on remand did not include the issue of damages, the amount and the interest thereon shall not be modified.

9. To the extent that any of the Findings of Fact set forth above are deemed to be Conclusions of Law or to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed to be Conclusions of Law or Findings of Fact as the case may be.

DATED: November 18, 1980.

/s/ WILLIAM B. ENRIGHT, *Judge*
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 71-036-E

UNITED SCOTTISH INSURANCE COMPANY, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

CIVIL NO. 71-037-E

KATHERYN FLEMING, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

CIVIL NO. 70-138-E

MAXINE CEARLEY, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANTS.

CIVIL NO. 71-038-E

SIMON WEAVER, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

CIVIL NO. 71-039-E

JOHN W. DOWDLE, JR., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

Filed December 17, 1980

CONFIRMATION OF JUDGMENTS AFTER HEARINGS ON REMAND

This cause was remanded for further findings from the Court of Appeals for the Ninth Circuit, and hearings were held in the above-entitled court, the Honorable WILLIAM B. ENRIGHT, Judge Presiding, sitting without a jury, on June 10, 1980 and September 19, 1980. Attorney RICHARD F. GERRY appeared as counsel for plaintiffs UNITED SCOTTISH INSURANCE COMPANY, et al., KATHRYN FLEMING, et al., SIMONE WEAVER, et al., and JOHN W. DOWDLE, JR. Attorney JAMES H. MILLER appeared as counsel for plaintiff MAXINE CEARLEY, et al., and MICHAEL QUINTON, Assistant United States Attorney, appeared as counsel for the defendant UNITED STATES OF AMERICA. Upon due consideration of the opinion of the Ninth Circuit, the additional pleadings and memoranda, other documents filed herein, the evidence presented throughout the course of these proceedings, and the arguments presented at the hearing on remand, the court issues additional Findings of Fact and Conclusions of law and confirms the judgments in plaintiffs' favor.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' judgments against defendant UNITED STATES OF AMERICA entered herein on March 23, 1976, are confirmed.

/s/ WILLIAM B. ENRIGHT, Judge
United States District Judge

Dated: 12/16/80

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-5062
DC CV 70-138, 71-036, 71-037,
71-038, 71-039 WBE

UNITED SCOTTISH INSURANCE, KATHRYN FLEMING, MAXINE CEARLEY, SIMONE WEAVER & JOHN W. DOWDLE, PLAINTIFFS-APPELLEES,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

APPEAL from the United States District Court for the Southern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
Attest: Jan. 6, 1983

PHILLIP B. WINBERRY
Clerk of Court

by: /s/ OSCAR TAGLE
Deputy

Filed and entered October 8, 1982

Office-Supreme Court, U.S.
FILED
APR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Petitioner*

v.

UNITED SCOTTISH INSURANCE CO., *Et Al.*,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Should not the United States be liable under the Federal Tort Claims Act when the Federal Aviation Administration ("FAA") voluntarily assumes the duty, ordinarily performed by private persons, to inspect a modification of an aircraft and the negligence of the FAA employee assigned to do the inspection is a proximate cause of the subsequent crash of the aircraft and the death of all persons aboard?

2. Whether the discretionary function exception to the Federal Tort Claims Act should shield the United States from liability for the negligence of a FAA employee in failing to carry out his day-to-day duties of inspecting the modification of an aircraft as mandated by the Federal Air Regulation promulgated by the FAA.

3. Are actions against the United States for damages for wrongful death and property damage caused by the negligence of a FAA employee in inspecting and returning to service an aircraft with a dangerously faulty gasoline fueled heater barred by the misrepresentation exception to the Federal Tort Claims Act?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT

On October 8, 1968, a DeHavilland Dove aircraft, owned and operated by plaintiff JOHN DOWDLE caught fire in midair, crashed and burned in Las Vegas, Nevada. The pilot, co-pilot, WEAVER and passenger FLEMING and CEARLEY were killed. The fire, crash and deaths were caused by a faulty fuel line to a gasoline fueled heater located in a compartment below and forward of the pilot's compartment. The heater and fuel line were negligently installed by an aircraft repair station in Dallas, Texas in 1965.

None of the discussion in petitioner's brief relative to the certification of aircraft is relevant to this case except that pertaining to the "supplemental type certificate" provided for in 14 C.F.R. 21.113 *et seq.* If the owner of an aircraft desires to modify the

aircraft, such a supplemental type certificate must be obtained from the FAA. In this case, because it was a one-time modification, no detailed plans or specifications were provided to the FAA. The only "specifications" consisted of polaroid pictures taken of the "as built" installation. Under these circumstances, it is mandatory that an FAA inspector, as distinguished from a private person, inspect the installation and approve the aircraft for return to service. That was done in this case, albeit, negligently.

The fuel line was installed by utilizing a copper fuel line mounted in the belly of the aircraft that had been part of a priming system which was no longer in use. (FF 11)* This copper fuel line was cut at a point just forward of a sloping bulkhead which separated the passenger compartment from the cockpit and forward luggage compartment (located directly below the cockpit). (FF 12) A stainless steel fuel line was coupled to the copper line with a stainless steel junction block. From there the line was led up to the left, along the forward side of the sloping bulkhead to the upper left corner of the rear wall of the forward baggage compartment. There it was clamped and run forward along the ceiling of the forward baggage compartment to a valve attached to the ceiling. (FF 13) From the valve the line was run forward to the combustion heater located in a nose compartment of the aircraft. (FF 14) This line was unsupported or improperly supported for a run of approximately three and one-half feet. (FF 15) It was placed within 1/16" of a stainless steel bolt and nut which could cause a rupture in the line. (FF 17) The existing copper line which was used was not annealed. If copper tubing is not annealed, stress concentrations created when it is formed create points where subsequent vibra-

*FF = Findings of Fact 1975 — First Trial

tion can lead to fracture and catastrophic failure. (FF 18) The stainless steel line was free to vibrate with a fore and aft motion of approximately three inches from center in each direction and an additional horizontal motion along the face of the sloping bulkhead. This vibrational excursion was greatly in excess of that permitted by Federal Aviation Regulations, and could have been eliminated by the proper use of clamps. (FF 19)

The heater installation exhibited numerous design deficiencies which should have alerted any reasonably competent FAA inspector to the fact that the overall quality of the design and fabrication was not consistent with FAA regulations and standards. (FF 21) The heater installation was unairworthy. (FF 22) The fire was caused by an escape of fuel from the heater fuel line because of the failure of that line along or just below the forward wall of the sloping bulkhead due to metal fatigue or chaffing caused by excessive vibrations of the fuel line. (FF 25, 26)

After the heater line was installed along the sloping bulkhead separating the forward baggage compartment and the afterpart of the aircraft an aluminum skin was placed over this bulkhead. The line was therefore not visible to subsequent mechanics or inspectors and subsequent inspections did not require the removal of this skin. It is impossible, uneconomical, unreasonable and unfeasible for an owner of an aircraft inspected and certified by the Federal Aviation Administration to take down the entire airplane and inspect it completely. Subsequent inspections are done only to the extent required by the Federal Air Regulations. Although the United States continues to suggest that such inspections took place there is here no finding whatsoever that those inspections altered or modified the aircraft in any way or that they contributed in any way to the accident and certainly not that they were such an independent intervening cause of the accident so as to

relieve the United States from the liability for the negligence of the FAA inspector.

If the FAA inspector had properly inspected the heater installation in accordance with FAA regulations, the aircraft repair station would have been required to either remove the installation because it was unairworthy or to modify the installation to correct the excessive vibration of the fuel line, use of dissimilar metals and other defects so as to make the installation airworthy. In either case, the accident at issue herein would not have occurred if a non-negligent, proper inspection had been made. (FF 27) The negligence of the FAA inspector was a proximate cause of the inflight fire, crash and death of plaintiffs' decedents. (FF 29)

REASONS FOR DENYING THE PETITION

The United States argues that this Court should grant its petition for certiorari and reverse the decision below because the Court of Appeals' interpretation of the Federal Tort Claims Act cannot be limited to aircraft litigation. It then raises bogeyman questions of unlimited and staggering liability by reciting other areas in which the government may have a regulatory function. We would assume that whether or not there would be liability in any of those other areas would depend on the law, regulations and facts in each instance just as this case depends on the law regulations and facts in this single instance. Courts have little difficulty in distinguishing one activity from another or one case from another.

But even if the government was correct in its contention, the solution is not for the courts to back away from their duty to render a proper decision under the existing law but for Congress to change that law or the agency to promulgate other regulations. The Federal government herein has voluntarily assumed certain

obligations and duties by the passage of the Federal Aviation Act of 1958 and its predecessors and by the Federal Air Regulations promulgated pursuant to that Act. These voluntary assumptions of duty, at least under the Good Samaritan Rule as applied in California and Texas, carry with them the obligation to perform those duties with due care or be liable as would a private party for injuries and damages resulting from lack of due care.

The reasoning of the government is circular in nature. It says "This activity falls within a regulatory function of the government." It then says "Since this activity falls within a regulatory function of the government, it is not an activity that could be carried out by private persons. Therefore, since no private person could be held for this activity, the United States cannot be held liable either." This reasoning might apply to the promulgation of regulations. But we are not complaining about the failure of the United States to pass proper regulations, more stringent regulations or any regulations. The sole claim is that an employee charged with the day to day duty of carrying out regulations properly promulgated was negligent in doing so.

The reasoning, however, is invalid when applied to the inspection of machinery. It has long been the law of California that a person whose negligence in failing to properly inspect machinery may be held liable to individuals injured as a result of that negligence. See *Dahms* v. *General Elevator Co.*, 214 Cal.733 (1932).

1. The Court of Appeals after the first appeal returned this matter to the District Court for further findings. The Court of Appeal had concluded that courts may not determine governmental liability without considering the liability of a private person in "like circumstances" pursuant to relevant state law. The District Court then conducted an extensive trial and found that prior to the passage of Federal legislation all inspections were

conducted by private persons. The government concedes in its brief that even after the United States had attempted to pre-empt the field most inspections are conducted by private persons.

Petitioner in its brief states, "The Court of Appeals acknowledged that no private person assumes responsibilities in any way comparable to those of the FAA." (See App. A, *infra*, 3a)" Petitioner's Brief, p. 15. This gross misstatement of the record cannot be left unchallenged. The Court of Appeals made no such acknowledgment in its opinion. It affirmed the judgment of the District Court which expressly found that the inspection of aircraft is not a uniquely government function but rather one which was traditionally performed by private persons. In fact, the government itself admits in its brief (page 4) that most inspections are still conducted by private persons.

Prior to the government entering into the aviation field in 1927 with the passage of the first Air Commerce Act, aircraft were being manufactured, modified, altered, repaired and inspected by private persons in the United States. As in all other fields, they were liable for negligence in any one of those activities to anyone injured by such negligence. Following the passage of the first Air Commerce Act, the government in 1931 promulgated the first regulations involving alterations and repairs to licensed aircraft. The role of the United States in pre-empting the field of aviation with regard to the inspection and certification of aircraft is similar to the take-over of the control tower operations by the United States. The question as to whether or not the United States could be held liable for the negligence of its employees in operating control tower now appears clear. But, in the early cases the United States insisted that its tower operators performed governmental functions of a regulatory nature, that no private individual had such power of regulations, that

therefore the Federal Tort Claims Act did not permit suit based on negligent performance of their duties. Such contentions have uniformly been rejected by the courts in the control tower situation. *Eastern Airlines* v. *Union Trust Company*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd. sub. nom., United States* v. *Union Trust Company*, 350 U.S. 907 (1955); *Ingham* v. *Eastern Airlines, Inc.*, 373 F.2d 227 (2nd Cir. 1967). Here, as in the air controller cases, the United States has taken over voluntarily a function which had previously been conducted by private persons. In fact, unlike the air controller cases, here the function is still being carried on in great part by private persons.

The government having voluntarily assumed a duty, the breach of which would create liability on a private person, is liable when one of its employees negligently fails to carry out that duty. Those cases cited by the United States, such as *Raymer* v. *U.S.*, 660 F.2d 1136 (6th Cir. 1981), do not hold to the contrary but merely hold that there has been a failure of proof of one of the elements necessary to hold the government for a Good Samaritan assumption of duty and breach thereof. In the *Raymer* case, for example, there was a failure to prove reliance. In the instance case, reliance was specifically found by the court.

2. Petitioner's brief complains that the Court of Appeals, "engaged in only the most cursory examination of the discretionary function . . . exception to the Tort Claims Act . . ." However, the United States thought so little of the discretionary function exception defense that it abandoned this defense in the first appeal of these cases. On that appeal in Appellant's Reply Brief, page 3, it is stated:

> The case of *Duncan* v. *United States*, 355 F.Supp. 1167 (D.C. 1973) is also inapposite when related to the contentions of the United States. The *Duncan* court merely ruled the United

> States had no viable defense in the 'discretionary function' exception to the Federal Tort Claims Act. 28 U.S.C. §2680(a). *Nowhere on appeal has the United States argued that the discretionary function exception applies in the instant action.* (Emphasis added).

Even though the discretionary function exception was not argued in the first appeal, the Court of Appeals sent the matter back for determination of the application of the Good Samaritan Rule with the statement:

> When the regulations implement only Good Samaritan conduct of the government, we do not believe that liability should be predicated upon violation of regulations alone. At the same time, such regulations or statutes may create a 'duty' such that the government may not take advantage of the 'discretionary function' exception of the Act. 28 U.S.C. §2680(a). See *United Airlines, Inc.* v. *Wiener*, 335 F.2d 379, 395 (9th Cir.), Cert. Dismissed, 379 U.S. 951 (1964). *United Scottish Insurance Co.* v. *United States* (1979) 614 F.2d p. 188.

Thus, while a cause of action would not lie against the FAA for failing to enact more stringent safety requirements herein, the enforcement of the existing safety inspection certification regulations is operational level conduct for which the FAA may be held liable. Once formulated, the regulations in the manual used by the FAA inspector, of which judicial notice has been taken, establish a well-defined "duty" for aviation inspectors that is not logically included under the definition of discretionary function.

Among the decisions distinguishing between policy decisions and operational tasks are those rejecting the discretionary function defense in the air controller cases. *Eastern Airline, Inc.* v. *United Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955); *United States* v. *Furumizo*, 381 F.2d 62 (9th Cir. 1967); *Ingham* v. *Eastern Airline, Inc., supra; Stork* v. *United States*, 430 F.2d 1104 (9th Cir. 1970). A task is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary when it involves enforcement

or administration of a mandatory duty at the operational level. There is no discretion in this matter. In this case, the FAA inspector was *required* to inspect the heater installation. His manual and the regulations which the District Court found violated *required* him to view the installation and compare it with the regulations and standards. He failed to do so properly. This is negligence at the operational, not the planning, level.

Thus, even if the discretionary function exception was not waived by the United States in the first appeal it clearly does not apply to the facts of this case.

3. The United States argues that the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h) bars recovery in this case even though the acts of the inspector were negligent. It suggests that the reasoning of the Court of Appeals herein was inconsistent with this Court's decision in *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961). It points out that the Court of Appeals relied heavily on *Neal* v. *Bergland*, 646 F.2d 1178, 1183-1184 (6th Cir. 1981), cert. granted No. 81-1494. Because of *Neal* they state that the Court may wish to hold this petition pending the decision in *Neal*. We would assume that with the decision in *Block, etc., et al.* v. *Neal*, U.S. 81-1494, decided March 7, 1983 the United States will feel bound to abandon this contention on appeal.

This case, like *Neal*, does not focus on the government's failure to use due care in issuing an airworthiness certificate but rather on the government's breach of another duty. In this case, the District Court and the Court of Appeals found that the FAA voluntarily undertook to inspect the heater installation in the aircraft, that the FAA inspector failed to use due care in carrying out his inspection activity and that the plaintiffs suffered injury proximately caused by the FAA's failure to use due care.

In this case also, unlike *Neustadt,* the government's misstatements are not essential to plaintiffs' negligence claim. The Court of Appeals in *Neal* found that to prevail under the Good Samaritan doctrine, Neal must show that Government officials voluntarily undertook a duty; that they failed to use due care in carrying out this activity and that she suffered some pecuniary injury proximately caused thereby. In this case, the District Court *has found* and the Court of Appeals has affirmed that the FAA assumed a duty to inspect the installation; that the official failed to use due care in his inspection activity and that the plaintiffs herein suffered injury thereby.

While in *Neal* the plaintiff will now be able to show that the house would not have been turned over to her in a defective condition if the government officials had carried out their duties, the plaintiffs herein have already successfully proved that the aircraft would not have been in service and the injuries and damages herein complained of would not have been incurred if the government official involved had carried out his duties with all due care.

The misrepresentation defense has been asserted by the United States in many cases involving death, injury or property damage incurred in aviation accidents. In *Wenninger* v. *United States,* 234 F.Supp. 499 (D.C. Del.1964); *Ingham* v. *Eastern Airlines, Inc., supra; Murray* v. *United States,* 327 F.Supp. 835 (D.C. Utah 1971); *United Airlines, Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir. 1964) the courts rejected the government's arguments that it was shielded from liability for failing to warn that air space was used by military aircraft, failure to convey weather information, negligently publishing and distributing aeronautical charts which falsely indicated that runway lighting was available, and failing to inform a civil air carrier of the details of the government's hazardous activities. In each of these instances the court indicated

that the gravamen of the actions was not misrepresentation but the negligent performance of operational tasks even though such negligence consisted partly in a failure of a duty to warn.

We would hope that *Block* will once and for all have distinguished the duty of the government to carry out the underlying task and the inapplicability of the misrepresentation defense to that duty from cases such as *Neustadt*. Clearly, here, plaintiffs relied not on a document which most of them had never seen but, as held by the District Court, on the proper performance of the duty to inspect.

CONCLUSION

The petition for a writ of certiorari should not be granted. The decision of the Court of Appeals was a correct application of well-established law in accord with mainstream decisions of other courts and presents no unique question requiring resolution by this Court. This Court's decision in *Block* v. *Neal* resolved any remaining doubt about the applicability of the misrepresentation defense. The discretionary function defense was abandoned and clearly does not apply. The courts below have correctly applied the Good Samaritan rule to the facts of this case.

DATED: April 14, 1983.

Respectfully submitted,

/s/

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CLERK

No. 82-1350

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 82-1350

UNITED STATES OF AMERICA, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. The petition in this case presents three questions, the third of which is whether respondents' claim that the government failed to inspect adequately the installation of a gas heater in an airplane is barred under 28 U.S.C. 2680(h) as a claim arising out of misrepresentation.[1] See *United States* v. *Neustadt*, 366 U.S. 696 (1961). On March 7, 1983, this Court held in *Block* v. *Neal*, No. 81-1494, that Section 2680(h) bars only claims of injury based on a plaintiff's reliance on misinformation and not all claims that derive from negligent inspections. Thus, to the extent that respondents did not rely upon the FAA's certificate itself as the basis

[1]On the same day we filed our petition in this case, we also filed a petition in *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349, which presents the same issues. We have suggested that *Varig Airlines* should be held pending the disposition of this case.

for their claims (which presumably would include the passengers), their claims are not barred by Section 2680(h), as interpreted in *Block* v. *Neal*.[2]

This Court in *Neal*, however, stressed (slip op. 5) that two additional, important issues were left undecided by that decision: whether a claim based on an inadequate inspection satisfies the requirements of the good samaritan doctrine so that liability may be imposed on the government as if it were a private person (see 28 U.S.C. 2674), and whether such a claim is barred by the "discretionary function" exception to the Federal Tort Claims Act in 28 U.S.C. 2680(a). Those issues are squarely presented in this petition and their resolution is, if anything, more critical in light of the Court's construction of the "misrepresentation" exception in *Neal*.

Respondents attempt (Br. in Opp. 4-5) to minimize the significance of the decision below holding the United States liable for this plane crash by asserting that they "assume" that each regulatory inspection case will be decided on its own "law, regulations and facts." But respondents do not indicate how the ruling that the United States is liable here can be limited to FAA inspections.[3] As we indicated in our petition (Pet. 10-11), the United States' exposure to liability

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[2]We note in this regard that respondent Varig in No. 82-1349 makes a special point (82-1349 Br. in Opp. 7, 9) of indicating that it did rely specifically on the certificate as the basis for its decision to buy the plane. Thus, it could be argued that Section 2680(h), as interpreted in *Neal*, does bar respondent Varig's claim for the loss of the plane itself.

[3]The court of appeals' decision has already been relied upon by other lower courts in FTCA cases involving claims other than FAA negligence. See, *e.g.*, *General Public Utilities Corp.* v. *United States*, 551 F. Supp. 521, 528 n.6 (E.D. Pa. 1982) (Nuclear Regulatory Commission inspection); *Gail Merchant Irving* v. *United States*, No. 81-501-D (D. N.H. Mar. 22, 1983), slip op. 5-7, 9 (OSHA inspection).

is enormous because the government engages in comparable regulatory activities with regard to virtually every industry engaged in interstate commerce.[4]

2. Nor have respondents been able to explain away the conflict in the circuits regarding the requirements of the good samaritan doctrine as applied to the United States' regulatory activities. As we pointed out in the petition (Pet. 15-19), the First, Sixth and Eighth Circuits all have required proof that the injured party relied specifically on the government's allegedly negligent conduct and not merely generally on the notion that the government regulates safety in the particular industry affected. See *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978); *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Gelley* v. *Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 561 (8th Cir. 1979). After we filed the petition, the Eleventh Circuit reached precisely the same conclusion, holding that the absence of proof that the plaintiff had relied on or even had knowledge of the existence of the FAA's particular regulatory activity at issue in that case was fatal to his claim under the good samaritan doctrine. See

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[4]Respondents suggest (Br. in Opp. 4-5) that if the decision creates a problem for the United States it is for Congress or the administrative agencies to correct. But the issue is whether Congress clearly intended to waive sovereign immunity in this situation when it enacted the FTCA. We submit that Congress could not have intended to subject the federal government's administrative inspection programs to judicial scrutiny through the medium of tort litigation, or to expose the federal treasury to suits involving literally billions of dollars in liability. Thus, Congress' power to amend the FTCA does not obviate the necessity for respondents to show clearly that Congress waived the United States' sovereign immunity for these claims in the first place.

Sellfors v. *United States*, No. 80-7897 (11th Cir. Feb. 16, 1983), slip op. 1670.[5]

Respondent argues (Br. in Opp. 7-8) that there is no conflict because the issue is a factual one; the courts cited above simply failed to find proof of reliance while the court of appeals here found that respondents had relied on the government's actions. But this response ignores the *legal* standard employed by the court below in finding that respondents had relied on the FAA's safety inspection. The court of appeals did not require specific reliance on the issuance of the supplemental type certificate, as the other courts would have; it held that liability was established solely because "the government reasonably could expect that members of the public would rely on the government's certification of airworthiness" (Pet. App. 4a). This conclusion is thus dependent on a legal standard that has been rejected by several other courts of appeals. Accordingly, the recurring issue of what type of reliance is required in order to hold the government liable under the good samaritan doctrine for negligence in its inspection programs warrants review by this Court.[6]

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[5]The court of appeals in *Sellfors* also rejected the argument that the United States was liable under the FTCA for its failure to enforce compliance with contractual assurances provided by federal grant recipients under the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.* "The legislative history [of the AADA] shows no intent to impose a legal duty on the FAA, running to each user of a federally funded airport, to insure the absolute safety of each facility constructed or maintained with federal funds." Slip op. 1668.

[6]Respondents argue (Br. in Opp. 6-8) that the requirement of the good samaritan doctrine that the defendant perform a service on behalf of the plaintiff is satisfied here because the United States has "preempted" the field of inspection and certification of safety in aviation. This is incorrect. The FAA does not assume sole or even primary responsibility for the safety of aircraft. That responsibility remains at all times on the manufacturers, owners and operators of the aircraft. See 14 C.F.R. 21.33(b)(1). The FAA's responsibility is a governmental one, running to the general public.

3. Respondents contend (Br. in Opp. 8-10) that the court of appeals was correct in finding that the inspection was an operational task and therefore not within the "discretionary function" exception to the Federal Tort Claims Act in 28 U.S.C. 2680(a).[7] But respondents completely ignore the argument presented in the petition. Our submission (Pet. 13-20) is that the court of appeals erred in focusing solely on the FAA's inspection of this single gas line in this single airplane in concluding that the agency was engaged in an operational task not within the exception; such a holding assumes that the FAA undertook the responsibility to find *every* defect in *every* airplane that flies over our airspace. In other words, the court in essence has held that the government guarantees the safety of every plane it certifies.

In fact, the FAA adopts specific regulations only to ensure that the groups it regulates—aircraft manufacturers, operators and owners—will make certain that the airplane over which they have primary control will comply with minimum safety standards. The airline was negligent in operating an aircraft that failed to satisfy FAA safety standards; yet respondents would force the federal government to compensate them for their losses due to this negligence because the FAA did not discover the defect and demand that the airline or a previous owner correct it. Respondents' contention and the decision below would require the FAA to change dramatically its regulatory function from that of a policeman to that of a mechanic or a

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[7]Respondents suggest (Br. in Opp. 9) that the government may have waived the "discretionary function" argument by not raising it during the first appeal of this case in the Ninth Circuit. Respondents did not assert waiver in the court of appeals and the court below considered the issue as properly presented. Moreover, the issue of whether respondents' claim for damages against the United States is barred under Section 2680(a) is jurisdictional and therefore may be raised at any time. Fed. R. Civ. P. 12(h)(3).

repairman.[8] No decision of this Court has ever construed Section 2680(a) to permit such judicial modification of an agency's regulatory role. It is only when the government assumes responsibility for the safety of specific individuals, such as by operating a lighthouse or a control tower,[9] that this Court has held that there is no discretion to fail to protect those who reasonably rely upon the action of government employees. These cases thus do not control this one. See *George* v. *United States*, No. 82-1321 (4th Cir. Mar. 24, 1983), slip op. 3-6 (applying 'discretionary function' exception to uphold dismissal of FTCA claim challenging FAA's approval of aircraft design and issuance of type, production and airworthiness certificates).

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[8]That respondents have misconceived the FAA's role in aviation safety is demonstrated by their reliance (Br. in Opp. 5) on *Dahms* v. *General Elevator Co.*, 214 Cal. 733 (1932), as an analogous case under California state law. In *Dahms*, the defendant had contracted with the plaintiff's employer to maintain and repair the elevator that fell and injured plaintiff. The FAA's inspections, which are designed to protect the public safety, are in no way comparable to inspections by a private company that contracts to guarantee the safety of a particular piece of equipment.

[9]See *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955); *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), aff'd, 350 U.S. 907 (1955); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967).

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MAY 1983

DOJ-1983-05

SEE COMPANION CASE

{SHDKT } PROCEEDINGS AND ORDERS DATE: 02/07/84

CASE NBR 82-1-01350 CFX
SHORT TITLE United States
VERSUS United Scottish Ins., et al.

CASE STATUS: GRANTED
DOCKETED: Feb 10 1983

Entry	Date	Note	Proceedings and Orders
1	Dec 27 1982		Application for extension of time to file petition and order granting same until February 11, 1983 (Rehnquist, December 28, 1982).
2	Feb 10 1983	G	Petition for writ of certiorari filed.
4	Mar 4 1983		Order extending time to file response to petition until April 15, 1983.
5	Apr 15 1983		Brief of respondent United Scottish Ins., et al. in opposition filed.
6	Apr 20 1983		DISTRIBUTED. May 12, 1983
7	May 2 1983		Letter from Respondent in compliance with Rule 28.1 filed.
8	May 5 1983	X	Reply brief of petitioner filed.
9	May 16 1983		Petition GRANTED. The case is condolidated with 82-1349 and a total of one hour is allotted for oral argument. **********
10	Jun 2 1983		Record filed.
11	Jun 2 1983		Certified original record & proceedings, 4 vols., received.
13	Jun 29 1983		Order extending time to file brief of petitioner on the merits until July 30, 1983.
14	Jul 29 1983		Order further extending time to file brief of petitioner on the merits until August 13, 1983.
15	Aug 12 1983	*	Appendix of petitioner filed. VIDED. (photographic exhibits)
16	Aug 13 1983		Brief of petitioner United States filed. VIDED.
17	Aug 12 1983		Lodging received. To be returned to the Department of Justice.
18	Aug 15 1983		Joint appendix filed. VIDED.
19	Aug 26 1983	D	Motion of respondents for divided argument filed.
20	Sep 7 1983		Opposition of respondents Mascher, et al. to motion of

CONTINUE {

(SHDKT) PROCEEDINGS AND ORDERS DATE: 020784

CASE NBR 82-1-01350 CFX CASE STATUS: GRANTED
SHORT TITLE United States DOCKETED: Feb 10 1983
VERSUS United Scottish Ins., et al.

Entry	Date	Note	Proceedings and Orders
20	Sep 7 1983		Opposition of respondents Mascher, et al. to motion of respondents S.A. Empresa De Viacao Aerea Rio Grandense, et al. for divided argument filed.
22	Sep 12 1983		Order extending time to file brief of respondent on the merits until October 14, 1983.
23	Oct 3 1983		Motion of respondents for divided argument DENIED.
24	Oct 11 1983		Order further extending time to file brief of respondent on the merits until October 28, 1983.
25	Oct 14 1983		Brief amicus curiae of Assn. of Trial Lawyers of America filed. VIDED.
26	Oct 28 1983		Brief of respondents United Scottish Insurance Co., et al. filed. VIDED.
27	Oct 28 1983		Brief of respondent Varig Airlines filed. VIDED.
28	Nov 4 1983		Deposits and exhibits received.
29	Nov 16 1983		CIRCULATED.
30	Nov 23 1983		SET FOR ARGUMENT. Wednesday, January 18, 1984. This case is consolidated with No. 82-1349. (1 hour) (1st case)
31	Jan 10 1984	X	Reply brief of petitioner United States filed. VIDED.
32	Jan 18 1984		ARGUED.
33	Jan 24 1984	P	Motion of respondent S.A. Empresa De Viacao Aerea Rio Grandense for leave to file a supplemental brief after argument filed.